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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 426

WILLIAM HEIKKILA,
Appellant,

vs.

BRUCE G. BARBER, individually and as District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District, et al.,
Appellees.

Appeal from the United States District Court for the Northern District of California.

BRIEF FOR APPELLANT.

ALLAN BROTSKY,
240 Montgomery Street, San Francisco 4, California,
Counsel for Appellant.

GLADSTEIN, ANDERSEN & LEONARD,
LLOYD E. McMURRAY,
240 Montgomery Street, San Francisco 4, California,
Of Counsel.

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BRIEF FOR APPELLANT.

OPINION BELOW.

The decision of the District Court for the Northern District of California, Southern Division, is unreported. No opinion was written. A copy of the judgment of the Court is attached hereto as Appendix "A."

JURISDICTION.

The judgment of the District Court was entered on August 4, 1952. A petition for appeal was presented to the District Court on September 3, 1952. The jurisdiction of the Supreme Court to review the decision by direct appeal is conferred by Title 28 United States Code, §§1253 and 2201, and 5 U.S.C. §1009. The following decisions, among many others, sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Harisiades v. Shaughnessy, 342 U.S. 580, 72 S. Ct. 512;

McGrath v. Kristensen, 340 U.S. 162, 71 S. Ct. 224;

United Public Workers v. Mitchell, 330 U.S. 75, 67 S. Ct. 556.

The judgment appealed from is the judgment of a three-judge District Court, convened because the complaint directly attacked the constitutionality of certain sub-sections of the Internal Security Act of 1950, to wit, 64 Stat. 1006, 8 U.S.C. §137(2) (C), and 64 Stat. 1006, 8 U.S.C. §137-3.

QUESTIONS PRESENTED.

The District Court, three judges sitting, granted the Government's Motion to Dismiss a complaint which sought, on constitutional grounds, an injunction, declaratory judgment, and a review of administrative action, where appellant had been ordered de-

ported from the United States as having been since his entry a member of the Communist Party of the United States, and where the order was supported solely by appellant's admission, made at a prior, invalid, hearing, of former membership in the Communist Party. The questions presented are:

(1) Whether 64 Stat. 1006, 8 U.S.C. 137(2)(c), and 64 Stat. 1006, 8 U.S.C. 137-3 providing that an alien may be deported if he has at any time since entry been a member of the Communist Party of the United States, is invalid as a bill of attainder, an *ex post facto* law, and in violation of the First Amendment and of the due process clause of the Fifth Amendment to the United States Constitution.

(2) Whether the deportation order is invalid under the Fifth Amendment's prohibition of self-incrimination, because based upon appellant's own prior testimony received over appellant's objection.

(3) Whether the District Court erred in granting the motion to dismiss, where the complaint sought an injunction, declaratory relief, and a review of administrative procedure under Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009.

THE STATUTE INVOLVED.

This case attacks certain sub-sections of the Internal Security Act of 1950. The portions directly attacked are 64 Stat. 1006, 8 U.S.C. §137(2) (C), and

64 Stat. 1006, 8 U.S.C. §137-3, which provide as follows:

§137(2) (C):

"any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

* * * * * * *

"(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

* * * * * * *

"(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical sub-division of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;"

§137-3:

"(a) Any Alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in paragraphs (1) or (3) of section 137 of this title or * * * a member of any one of the classes of aliens enumerated in section 137(2) of this title, shall, upon the warrant of

the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in sections 137 to 137-8 of this title, irrespective of the time of their entry into the United States."

Also important for consideration are those provisions of the Internal Security Act of 1950 which define Communist organizations and which provide for the determination of what organizations fall within those definitions by a board specially provided for that purpose. These sections are designated by the short title of the Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U.S.C. 781, et seq. Significant portions of this statute are printed in Appendix "B".

STATEMENT OF THE CASE.

The case comes before this Court on appeal from a decision of a three-judge District Court granting the Government's motion to dismiss the action. No evidence was taken, and the entire record consists of pleadings. The statement of the case which follows is therefore taken from the complaint. (R. 1.) No answer having been filed to the complaint, and the case having been heard on the motion to dismiss alone, the facts stated in the complaint must, under the well-settled rule, have been taken as true by the District Court.

Plaintiff-appellant was born in Finland in 19 and came to the United States about the age of 2 months with his parents. He has ever since his a rival resided in the United States. (R. 2.) Plai tiff has pending before a state Court a petition f naturalization. (R. 5.)

In 1947 a warrant was issued for his arrest, char ing him with violation of the Immigration laws the United States in that he was alleged to be a mer ber of an organization which believed in, advised, a vocated or taught the overthrow of the Governmie by force, violence or other unconstitutional means, proscribed by the provisions of 8 U.S.C. §13

Hearings were held in 1949 before a hearing offic of the Immigration and Naturalization Service und the charge contained in that warrant. (R. 2, 3.) The hearings did not conform to the requirements of t Administrative Procedure Act, 5 U.S.C. §1001, et se Subsequently, by reason of the decision of the S preme Court of the United States in the case of *Wo Yang Sung v. McGrath*, 339 U.S. 33, 70 S.Ct. 445, tho hearings were abandoned by the Immigration Servi and new hearings were instituted before a Hearir Examiner who purported to be appointed under a to be conducting the hearings in accordance with t provisions of the Administrative Procedure Act. The hearings were held in June, 1950.

The hearing officer had before his appointment as Hearing Examiner been an employee and officer of t Immigration and Naturalization Service for mar years and had conducted investigations, prosecutio

and hearings of aliens in that capacity. The complaint alleges that the Hearing Examiner was not an impartial hearing officer in accordance with the requirements of the Administrative Procedure Act. (R. 4.)

During the course of the hearing the plaintiff was asked whether he was a member of the Communist Party. He testified that he was not. (R. 11.) He refused to testify about his membership during the years 1929 to 1939. There was then introduced in evidence, over plaintiff's objections, portions of the transcript of the testimony taken at the 1949 hearing in which plaintiff had under oath testified that he was a member of the Workers Party and the Communist Party during the years 1929 to 1939. (R. 11, 12.)

After the admission of this evidence a new charge was lodged against plaintiff, charging him with a violation of Section 22 of the Subversive Activities Control Act of 1950, (Public Law 831, 81st Congress, 2nd Session, 64 Stats. 1006, 8 U.S.C. §§137(2)(C) and 137-3, in that he was alleged to have been since his entry into the United States a member of the Communist Party. (R. 12.) All evidence relating to the nature of, and the aims or objectives of the Communist Party was stricken from the record, the decision of the hearing officer was confined to the lodged charge and supported only by the testimony given at the 1949 hearing. (R. 12, 13.)

The plaintiff offered, in the administrative hearings, to prove (and in his subsequent complaint alleged (R. 5)) that he had not advocated the overthrow of the Government, and that neither the Workers Party

nor the Communist Party had during the period when he was alleged to have belonged advocated such overthrow of the Government. The offer was rejected. (R. 6.)

An order of deportation was recommended by the hearing officer, and this recommendation was sustained through the usual administrative appeals, so that there was on January 11, 1952, a final order entered for the deportation of plaintiff, solely upon the ground that he had been found to have been a member of the Communist Party of the United States since his entry into the United States. (R. 5.)

Plaintiff sought to prevent his deportation by an action against the District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District, the defendant Bruce G. Barber, and all persons acting under his direction, or in concert with him, and the successors of the defendant or any other defendants. In addition to temporary and permanent injunctions, plaintiff sought by this complaint a declaration of rights, alleging that there existed a controversy between plaintiff and the defendants in that the plaintiff maintained that the acts and threatened acts of the defendants were illegal and void, while the defendants maintained that their actions and threatened actions were lawful in all respects. (R. 6.)

Plaintiff also sought a review of the action of the defendant Bruce G. Barber under provisions of Section 10 of the Administrative Procedure Act. 5 U.S.C. §1009. (R. 7.)

The complaint alleged that the statute under which his deportation had been ordered was unconstitutional and void as a bill of attainder and an *ex post facto* law prohibited by the provisions of Article I, Section 9, Clause 3 of the Constitution of the United States, and a deprivation of the guarantees of free speech and free press contained in the First Amendment to the Constitution of the United States, and of the guarantees of due process of law contained in the Fifth Amendment to the Constitution of the United States. (R. 6.) It was also alleged that the use of the testimony from the 1949 hearing, as the sole evidence to support the deportation order, was a violation of the guarantee against self-incrimination contained in the Fifth Amendment to the Constitution of the United States. (R. 3.)

The complaint alleged that a three-judge Court would be required for adjudication of this cause. (R. 1.)

Upon the filing of the complaint a three-judge Court was convened by Judge Clifton Mathews of the Court of Appeals for the Ninth Circuit, and a hearing was set for August 1, 1952. (R. 7.) Thereupon the defendant filed a motion to dismiss the complaint upon the ground that the complaint failed to join an indispensable party, to wit, the Commissioner of Immigration and Naturalization. The motion was also based upon the ground that the complaint fails to state a claim upon which relief can be granted, in that the issues raised by the complaint are moot since the plaintiff had been accorded a fair hearing; that

the statutes attacked are constitutional; and that the plaintiff had an adequate remedy at law. (R. 8, 9.)

Upon these pleadings, and the affidavit of George R. Andersen in support of the complaint (which set forth with some particularity the facts surrounding the introduction of the testimony from the 1949 hearing) (R. 9-13), the cause was argued before a three-judge Court consisting of Judge Clifton Mathews, of the Court of Appeals for the 9th Circuit, and District Court Judges Louis E. Goodman and Oliver J. Carter. The Court entered its judgment on August 4, 1952, denying a temporary injunction, granting the defendants' motion to dismiss, and ordering the dismissal of the complaint. No opinion was written. (R. 13.)

SPECIFICATION OF ERRORS.

The District Court erred:

1. In failing to hold the provisions of the statute here attacked, 64 Stat. 1006, 8 U.S.C. §137(2)-(C), and 64 Stat. 1006, 8 U.S.C. §137-3, were unconstitutional as bills of attainder and *ex post facto* laws in violation of the provisions of Article I, Section 9, Clause 3, of the Constitution of the United States.

2. In failing to hold that said statutes were unconstitutional and void in that they contravened the provisions of the First Amendment to the Constitution of the United States and the guarantee of due process of law contained in the Fifth Amendment to the Constitution of the United States.

3. In failing to hold that the final order of deportation deprived plaintiff of due process of law and of the protection of the Administrative Procedure Act, 5 U.S.C. §1001, et seq., by reason of the conduct of the deportation hearing by a hearing officer who had prior to his appointment as Hearing Examiner under the provisions of the said Administrative Procedure Act conducted investigations, prosecutions, and hearings of aliens and was not an impartial hearing officer.

4. In denying a preliminary injunction and a trial on the merits where the question was presented to it upon the complaint and a motion to dismiss.

5. In denying a declaration of the rights of the parties.

6. In denying a review of the action of the Immigration and Naturalization Service and of the defendant Bruce G. Barber pursuant thereto.

7. In failing to hold that the order of deportation deprived plaintiff of due process of law and violated the guarantee against self-incrimination contained in the Fifth Amendment to the Constitution of the United States, by reason of the following:

(1) The said order of deportation was supported solely by the testimony of plaintiff, where that testimony was given at a prior hearing, which said prior hearing was void and illegal because it did not comply with the Administrative Procedure Act, 5 U.S.C., §1001, et seq.; and

(2) The testimony of plaintiff which concerned plaintiff's prior membership in the Communist Party of the United States was, when given, not self-incriminating and subjected the plaintiff to no penalty; but when used in the subsequent hearing was by reason of a change in the law, self-incriminatory.

SUMMARY OF ARGUMENT.

A. THE STATUTE IS A BILL OF ATTAINDER.

The statute is a bill of attainder. It meets all criteria. The statute inflicts punishment by legislative act rather than by the judgment of a judicial tribunal; upon a class. The statute designates the class as aliens who have since entry belonged to "the Communist Party of the United States," and prescribes the punishment, deportation, for any alien determined by the Immigration and Naturalization Service to be within the class. Thus membership alone punishes. *Wieman v. Updegraff,* ..... U.S. ....., decided December 15, 1952.

Punishment is imposed without a judicial trial upon a class described not in terms of its hurtful characteristics, but by the name of an organization. Punishment is imposed upon membership in an organization, not upon wrongful activity. This is invalid. *Mahler v. Eby,* 264 U.S. 32.

It inflicts punishment. To say that deportation after long residence in the United States for the

theretofore innocent act of joining a political organization is not punishment is to couch the law in a technical jargon inconsistent with the language of the Constitution. The cases which have held that deportation is technically not punishment have considered deportation for those engaged in clearly illegal activity. To deport one for marrying, studying law, or attending mass would certainly be punishment.

B. THE STATUTE IS AN EX POST FACTO LAW.

The statute disguises a penal sanction as a civil one. The imposition of civil sanctions upon theretofore lawful activity is an invalid disguise for criminal penalties and void as an *ex post facto* law. *Burgess v. Salmon,* 97 U.S. 381; *Harisiades v. Shaughnessy,* 342 U.S. 524. In any event, the application of great constitutional safeguards should not depend upon such an indefinable distinction as that between civil and criminal law.

The statute is an *ex post facto* law because it modifies a rule of evidence. It allows the Immigration Service to impose punishment of deportation upon proof of membership alone, although the only rationale for the statute is that membership connotes subversive activity. *Calder v. Bull,* 3 Dallas 386.

The statute is retrospective in operation. Membership in the Communist Party was never proscribed by Congress upon pain of deportation until 1950.

When Congress passed the Alien Registration Act of 1940 in response to *Kessler v. Strecker*, 307 U.S. 22, it intentionally failed to provide that past membership in the Community Party was a ground for deportation.

C. THE STATUTE VIOLATES THE FIRST AND FIFTH AMENDMENTS.

The plenary power to deport is not involved in the case. When the Constitution says, "No Bill of Attainder or ex post facto Law shall be passed," this limits Congress as to the means it may use to attain a permissible end, and deprives Congress of the power to enact this statute.

The political nature of the power to deport does not exempt this statute from judicial review, nor congressional statutes from positive constitutional prohibitions. If this is not so, then the political power informing this and similar statutes extends not only to deportation of aliens, but to deprivation of constitutional rights of Communists or any other group deemed hurtful to United States security in the political judgment of the Congress. The political power of legislatures does not extend that far. *Wieman v. Updegraff, supra.*

D. THE DEPORTATION ORDER VIOLATES THE PRIVILEGE AGAINST SELF-INCRIMINATION.

The deportation order in this case is based solely upon the admission of appellant given during an invalid administrative hearing, that he had been a prior member of the Communist Party. It was given when he had no reason to invoke the privilege against self-incrimination. He did not intend thereby to waive the privilege. *Amos v. United States,* 255 U.S. 313. When a subsequent change in law made his claim of the privilege proper, the introduction of his prior testimony over his objection compelled him against his will to testify against himself, in violation of the Fifth Amendment to the Constitution.

E. THE COURT BELOW DENIED DUE PROCESS OF LAW IN GRANTING A MOTION TO DISMISS THE COMPLAINT.

Where the complaint sought declaratory judgment, a review of agency action under the Administrative Procedure Act, and an injunction, it was error to grant a motion to dismiss. *McGrath v. Kristensen,* 340 U.S. 162; *United States ex rel Trindler v. Carusi,* 166 F. (2d) 457 (3. Cir.). To grant a motion to dismiss in the face of undenied allegations that the petitioner had never, and the Community Party had not during his membership, advocated overthrow of the Government by force and violence; that the sole support for the order of deportation was appellant's testimony obtained in violation of the guarantee against self-incrimination; and that his hearing was

conducted by a hearing officer who was not impartial, was a denial of due process of law. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123.

ARGUMENT.

A. THE STATUTE IS A BILL OF ATTAINDER.

In the Subversive Activities Control Act of 1950 Congres provided in Section 22 for the first time in the history of the United States that an alien could be deported if at any time since his entry into the United States he had become a member of the Communist Party of the United States. Under this statute the Immigration and Naturalization Service seeks, by an order made in 1952, to deport an alien who was admittedly a member of the Communist Party from 1929 to 1939. This admission alone is said to support the order of deportation.

1. Punishment is imposed upon a class.

By the familiar cases a bill of attainder is defined as a statute which imposes punishment upon named individuals or the members of an easily identified class. See *United States v. Lovett*, 328 U.S. 303, 66 S. Ct. 1073. The question of whether deportation is punishment is discussed below. For the purpose of the immediate argument, it is assumed that deportation is punishment.

The class upon which this punishment is visited is denominated "members of the Communist Party of the United States" who are aliens. The significant aspect of this designation is that it differs from all

other designations of deportable aliens which have heretofore been upheld as constitutional by this Court. As Mr. Justice Reed remarked in the *Carlson* case, supra,

> "Theretofore there was a provision for the deportation of alien anarchists and other aliens, who are or were members of organizations devoted to the overthrow by force and violence of the Government of the United States, but the Internal Security Act made communist membership alone of aliens a sufficient ground for deportation." 72 S. Ct. 531.

The description of this class differs from other descriptions of deportable aliens in our deportation statutes, *because it describes a political group, and not the characteristics which are deemed by Congress to indicate that an alien with such characteristics is an undesirable resident within our borders.*

Congressional designation of an undesirable class has been upheld where it set forth the underlying criteria used. In *Mahler v. Eby*, 264 U.S. 32, 44 S. Ct. 283, the Court was concerned with the deportation of two aliens who had been convicted of a violation of the Selective Service Act and the Espionage Act. The delegation of power to the Secretary of Labor to deport those who had been thus convicted, whom he found to be undesirable residents of the United States, was attacked as so vague and uncertain that it left the liberty of the alien to the whim and caprice of an executive officer in violation of the due process clause of the Fifth Amendment. Rejecting this view the Court said:

> "With the background of a declared policy of Congress to exclude aliens *classified in great detail by their undesirable qualities* in the Immigration Act of 1917, and in previous legislation of a similar character, we think the expression 'undesirable residents of the United States' is sufficiently definite to make the delegation quite within the power of Congress." 264 U.S. at 40. (Our emphasis.)

Congress has heretofore provided deportation for anarchists. In the *Carlson* case this Court, although concerned only with the question of detention without bail pending determination of deportability, remarked that the bar against the admission of Communists cannot be differentiated as a matter of power from that against anarchists which was upheld in 1904 in *Turner v. Williams,* 194 U.S. 279, 24 S. Ct. 719. The designation of anarchists, however, is a designation of those who have certain political and philosophical views, not those who belong to a certain organization. In the *Turner* case the Court construed the language of the Act as defining anarchists by the language which followed that word in the statute as "persons who believe in or advocate the overthrow by force and violence of the government of the United States or of all government or of all forms of law, or the assassination of public officials." 194 U.S. at 293.

Indeed, the only question in the *Turner* case, as the Court viewed it, was whether Congress had the power to exclude all alien anarchists when some anarchists were merely political philosophers whose teachings

are beneficial rather than otherwise. The decision of the Court turned upon its conclusion that Turner "contemplated the ultimate realization of his ideal by the use of force, [and that] his speeches were incitements to that end."

The Court nevertheless discussed the possibility that the anarchists excluded from the United States by the statute included those whose views were those of political philosophers innocent of all evil intent. The statute it found was valid even under that interpretation, saying:

> "It would follow that Congress was of the opinion that the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold *and advocate* them would be undesirable additions to our population * * *" 194 U.S. at 294. (Emphasis supplied.)

Thus it was the description of the class by a description of the *acts done* by the members of the class that was sustained in the *Turner* case.

Indeed, when the Secretary of Labor, in the *Mahler* case, attempted to avoid the necessity for making a finding that the aliens were undesirable residents, the Court sent the case back. The Court noted that the Secretary concluded that a finding was not essential to the deportation of these aliens. It said:

> "Indeed, he seems to have used forms applicable to aliens of a fixed excluded class, *to be deported on identification with the class*, without any further finding by him. The natural construction of his language is that he has become satisfied that they are in the country in violation of the act

solely because they have been convicted as stated." 264 U.S. at 44. (Emphasis supplied.)

Such a deportation order could not be sustained, the Court held, "* * * not only on the language of the statute, but also on general principles of constitutional government." 264 U.S. at 44.

No serious student of political theory could suppose that communists as political theoreticians are the same as the anarchists condemned in the case of *Turner v. Williams*, 194 U.S. 279, 24 S. Ct. 719. *The Encyclopedia of the Social Sciences* says in an article by Oscar Jaszi:

> "Anarchism—There is perhaps no other chapter in the history of social-political ideas which has caused so much confusion to the specialist as well as to the general public as the anarchist doctrine. Anarchism covers so many distinct conceptions and tendencies that it is difficult to reduce them all to a common denominator. Besides, it is not so much a definite scientific theory as a mass ideology colored by many emotional and religious elements. It can in general, however, be defined as an attempt to establish justice (that is, equality and reciprocity) in all human relations by the complete elimination of the state (or by the greatest possible minimization of its activity) and its replacement by an entirely free and spontaneous cooperation among individuals, groups, regions and nations." Vol. II, p. 46.
>
> "Modern anarchism assumed new tendencies in the pamphlets, speeches and propaganda of Michael Bakunin, with whom anarchism took a definitely collectivist form. He approved con-

mon ownership in land and other means of production, but retained private ownership in consumption goods and repudiated emphatically the state socialism of Marx." Vol. II, p. 49.

Sidney Hook, writing in the same *Encyclopedia* on the subject of violence, says the following:

"The nature and role of violence in Marxian theory and practice represent an attempt to mediate the dual impracticalities of pacifism and 'putschism'. Before the influence of Marx and Engels made itself felt on the socialist movement, the dominant political tendencies within it subscribed either to the philosophy of moral force or to that of direct action. Marx' philosophy of the state and his conception of political tactics, which made the main line of revolutionary strategy dependent upon objective social conditions, cut under both of these tendencies. Against those who pinned their faith solely upon moral force Marx pointed to the non-moral reality of the state as the governmental arm of the nation's industry and to its source of power in the existence of special bodies of armed men not part of the working population but standing over against it. It followed that any attempt to capture state power must be prepared to meet the state forces if necessary on their own ground. Against the direct actionists and all believers in the propaganda of the deed Marx argued that violence could succeed only when the social conditions ripe for a new order were at hand; that it must cap the process of organization of labor and not precede it; that if it took the customary individual form rather than a social form it invariably played into the hands of the reaction. Ad-

vocacy of such tactics could therefore be characterized either as the expression of irresponsible petty bourgeois anarchism or as downright police provocation. It would perhaps be no exaggeration to say that it was due to the spread of Marxist ideas among the working classes that individual acts of terror and violence almost disappeared from the labor movement in Western Europe. In Russia the spread of Marxism among the prerevolutionary intellectuals at the turn of the century and thereafter also led to a marked decline in terrorism. In Latin countries like Italy and Spain, where Marx' ideas did not strike deep root, anarchist syndicalist notions prevailed and labor disturbances took on an incipient revolutionary character. Even in the United States labor disputes which were caried through without the guidance of a broad social philosophy were accompanied by spontaneous individual violence which surpassed anything known abroad.

"Marxism holds that the chief objection to individual expression of violence or premature violent action on the part of working class groups is that such expressions invariably facilitate the policy of governmental repression. The objective presupposition of any violent action is a revolutionary situation defined as one in which there is chaos in economic life and in which the traditional psychology of all classes is demoralized. Revolutionary action is not begun unless there is reason to believe that a majority of the population stands behind the representative councils of workers and the producers in whose name power is taken. The amount of violence which must be employed is a function of the intensity of resistance which is encountered. For Marxism the

moral and social justification of the use of violence consists in the fact that it is a measure of defense on the part of the majority of the community against the horrors of war, poverty and political repression and aims to establish the political conditions under which the transition from a profit to a use economy may be effected." Vol. XV, p. 266.

See also letter of Engels to van Patten, dated London, April 18, 1883, pages 416-417, *Correspondence of Karl Marx and Frederick Engels*, International Publishers, 1942:

"Since 1845 Marx and I have held the view that *one* of the ultimate results of the future proletarian revolution will be the gradual dissolution of the political organization known by the name of *state*. The main object of this organization has always been to secure, by armed force, the economic oppression of the labouring majority by the minority which alone possesses wealth. With the disappearance of an exclusively wealth-possessing minority there also disappears the necessity for the power of armed oppression, or state power. At the same time, however, it was always our view that in order to attain this and the other far more important aims of the future social revolution, the working class must first take possession of the organized political power of the state and by its aid crush the resistance of the capitalist class and organize society anew. This is to be found already in the Communist Manifesto of 1847, Chapter II, conclusion.

"The anarchists put the thing upside down. They declare that the proletarian revolution must *begin*

> by doing away with the political organization of the state. But after its victory the sole organization which the proletariat finds ready in existence is precisely the state. This state may require very considerable alterations before it can fulfill its new functions. But to destroy it at such a moment would be to destroy the only organism by means of which the victorious proletariat can assert its newly-conquered power, hold down its capitalist adversaries and carry out that economic revolution of society without which the whole victory must end in defeat and in a mass slaughter of the workers similar to those after the Paris Commune.
>
> "Does it require my express assurance that Marx opposed this anarchist nonsense from the first day it was put forward in its present form by Bakunin? The whole internal history of the International Workingmen's Association is evidence of this."

The quotations above demonstrate not only that there is a marked difference between anarchists and communists as political theoreticians, particularly with regard to their attitude toward violence. They demonstrate also that despite the findings of Congress with regard to communists, and the conclusion of the District Court in *Harisiades v. Shaughnessy*, 90 F. Supp. 397, that the literature of Marxism generally indicates advocacy of violent overthrow of government, nevertheless a serious student of the subject may come to a different conclusion on that point. Certainly it is no secret that in all of the recent Smith Act trials the asserted position of the

defendants has been that they did not and that Marxist theory does not advocate such overthrow. Even so exhaustive a culling of Marxist literature as that performed by Judge Leibell in the *Harisiades* case, cited above, does not negative conclusively the proposition that the communists maintain that force and violence is to be used, if at all, only by the majority against the minority, when the minority resists the majority's attempt to achieve peaceable change in government.

Any review of this literature will at once raise the question how an individual member of an organization so widespread, so prolific in its writings, so vocal on so many public issues over the entire course of its existence, can possibly be held to know, with certainty, the exact doctrines which it advocates.

The position of an organization on a public question is always extremely debatable. The disagreement which recurs every election year about the meanings of the platforms of the various political parties should sufficiently illustrate this. If by way of analogy this Court were regarded as an organization, even though it consists of only nine members, it is clear that there is vast disagreement among its members about the position the Court has taken on the innumerable questions upon which it has passed. This extends not only to its prior pronouncements, but even in the very course of deciding a case.

While all of the justices would doubtless agree that this Court has as its purpose and objective to

assure that the decisions of courts and the acts of the legislative and executive branches of the government are in accordance with constitutional law, the doctrines of constitutional law applied by the Court to particular problems is frequently the matter of bitter debate. Thus one justice may be of the opinion that the Court has in recent cases watered down constitutional guarantees of individual liberty at the expense of individuals for the enhancement of the power of the government. Other members of the Court would doubtless emphatically disagree. The purpose and effect of the Court's position and action on a particular problem thus depends upon whose view is accepted.

As a hypothetical case, imagine a Congressional finding a decade hence, embodied in penal legislation, to the effect that a conspiracy had existed in the 5th decade of the century among government officials to knowingly subvert and deny to the people of the United States their constitutional rights; suppose further that Congress found that among the methods used to carry out this conspiracy were decisions of this Court which weakened individual constitutional liberties to the advantage of the Government; how should members of the Court be judged in prosecutions under such a statute?

Should the defendants in such a case be allowed to litigate the question whether the decisions in which they had participated had weakened constitutional rights? If they were allowed to do that, should they further be allowed to determine the issue of individ-

ual *scienter?* Or should the Congressional finding be conclusive as to the effect of the decisions, and the question of *scienter* ruled out as immaterial? In Heikkila's case, he was allowed neither to show that the organization had not advocated the overthrow of the Government by force and violence, nor that he had not knowingly belonged to an organization which so advocated. He has been concluded by the Congressional finding as to both the advocacy of the group and his individual knowledge of it. Assuming that the Communist Party did during Heikkila's membership advocate the overthrow of the Government by force and violence, he may have believed that it did not, just as earnestly as members of this Court believe that its decisions in recent cases have not watered down constitutional liberties to enhance the power of the central government. If he has that belief (and he has alleged that he does have it), it is of no avail to him under this statute.

The difficulty of ascertaining the nature and objectives of an organization has been recognized in the very statute which is here attacked. In Section 22 of the Act, cited in its codified form in an appendix, the Congress has set up an elaborate procedure for determining the question whose answer is assumed, in the sections here attacked as a bill of attainder, to be known to every Communist. Thus in Section 792(e) of Title 50, U. S. Code, are set forth eight criteria, many of them multiple, for determining whether an organization is a Communist-action organization, and in subsection (f) of the same section,

four criteria for determining whether an organization is a Communist-front organization. A brief examination of these provisions of the statute as they appear in the appendix will demonstrate the difficulty of supposing that an individual member could with certainty know precisely what the published or secret attitudes of the organization toward public questions might be.

Thus the criteria include: The extent to which the organization's policies are formulated and carried out pursuant to directives or to effectuate the policies of a foreign organization or foreign government; the extent to which its view and policies do not deviate from those of such foreign government or foreign organization; the extent to which it receives financial aid from such foreign sources; the extent to which it sends members or representatives to a foreign country for instruction or training; the extent to which it reports to such foreign government or organization; the extent to which "its principal leaders or a substantial number of its members" are subject to or recognize the disciplinary power of such foreign government or organization; the extent to which it fails to disclose its membership, or to which its members refuse to acknowledge membership therein, or to which it fails to disclose information other than membership lists, or the extent to which it operates on a secret basis, all for the purpose of concealing foreign direction, domination, or control; the extent to which its principal leaders or a substantial number of its members consider the allegi-

ance they owe to the United States as subordinate to their obligation to such foreign government or organization.

When it is remembered that according to the findings of the Congress as set forth in the first section of the Subversive Activities Control Act, a communist organization is a criminal conspiracy, then it is entirely clear that very few of the members of such a secret conspiratorial organization could know the things which are required to be known, with certainty, in order to be aware of the views and program of the organization.

The requirement that certain knowledge of the nature and objectives of a proscribed organization be known to one punished for membership is underlined by the concurring and dissenting opinion of Mr. Justice Frankfurter in *Garner v. Board of Public Works*, 341 U.S. 716, 726, 71 S. Ct. 909, 915:

> "* * * This ordinance does not ask the employee to swear that he 'knowingly' or 'to the best of his knowledge' had no proscribed affiliation. Certainty is implied in the disavowal exacted. The oath thus excludes from city employment all persons who are not certain that every organization to which they belonged or with which they were affiliated * * * at any time since 1943 has not since that date advocated the overthrow by 'unlawful means' of the Government of the United States or of the State of California."

These considerations underline the theory of appellant that a statute which proscribes, on pain of de-

portation, *membership in an organization* rather than *activity of a certain sort*, is by its nature unfair, punishing, and the very exemplar of the target at which the writers of the Constitution aimed the prohibition: "No Bill of Attainder or ex post facto Law shall be passed." United States Constitution, Article I, Sec. 9, Clause 3.

2. Punishment is inflicted by legislative act.

By the familiar decisions it is laid out that a bill of attainder punishes by a legislative act rather than by the judgment of a judicial tribunal. The fact of legislative punishment has been found where the legislature described a certain class, any member of which upon being identified would then be subject to execution or pains or penalties prescribed by the bill. See the *Cummings* decision, 4 Wall. 333.

In the case at bar the class of aliens described is identified by the name of a political organization, "the Communist Party of the United States". 64 Stat. 1006. Any person who is identified as being a member of that group is immediately upon that identification subjected to the punishment of deportation. By the terms of the statute and as the statute was applied in the case at bar, no inquiry is relevant in the case of an alien accused under this Act except the inquiry, "Was he at any time after his entry into the United States a member of the Communist Party of the United States?"

As this Court said in *Wieman v. Updegraff*, ... U.S. ....., supra, speaking of an Oklahoma statute

prescribing a loyalty oath for public officers and employees,

> "* * * The fact of membership alone disqualifies. If the rule be expressed as a presumption of disloyalty, it is a conclusive one."

The legislature has therefore inflicted punishment. The purely ministerial act of identifying members of the group thus penalized is entrusted to executive officers. The executive officers, however, have no discretion in the matter. The punishment is declared, and the means for its execution are prescribed by the Congress.

When William Heikkila was identified, by his own testimony, as a member of the proscribed organization, there was no choice given by this law to impose any punishment except that set forth in the statute—to be taken into custody and deported.

3. Punishment is imposed without a judicial trial.

The vice of punishment by the legislature is that the punishment is imposed by the legislative rather than the judicial branch of the government—that is, there is no judicial trial in which the commonly applicable rules of criminal and civil law apply. In the case at bar the legislature relies upon the Immigration and Naturalization Service of the Department of Justice, a branch of the executive department of the government, to carry out the imposition of the penalty. The only inquiry is as to the identification of the individual with the proscribed class. No consideration is given to the question of *mens rea;* no

jury sits; no judicial review is allowed. *Carlson v. Landon,* 342 U.S. 524; 72 S. Ct. 525. Upon identification, the punishment is automatic.

In the case at bar the identification of Heikkila was achieved by a trick or trap. His prior testimony regarding membership, transcribed, was introduced in evidence although it was not material to the issues then framed by the charges. The theory upon which its admission was sought and allowed was that such immaterial evidence, when admitted, would allow the lodging of a new charge changing the issues. (R. 10, 11.) And by the already admitted evidence the new charge would immediately be proved.

Such procedure is not judicial procedure. It is not, of course, defended or excused as judicial procedure. Its sole justification is that this is not a trial, but an administrative act of identification. To change the issues in the midst of a criminal trial would be clearly a violation of the right of due process, of notice and an opportunity to prepare a defense. But here, says the Government, what harm is done? The procedure has no effect on the determination of the issues, *for it is not guilt which is in issue.* That has already been determined by Congress. If guilt is known beforehand, and cannot be disputed, no defense is available. Procedure which is objectionable because it deprives one of opportunity to defend is perfectly satisfactory where no defense is allowed.

Thus would the Government justify its deportation order. The argument is cogent only because the trial took place in Congress, and the issue of guilt was adjudicated there.

4. It inflicts punishment.

As defined by this Court in numerous cases, a bill of attainder must be a statute which inflicts punishment. Deportation has been held to be a civil, rather than a criminal, sanction. *Mahler v. Eby,* 264 U.S. 32, 44 S. Ct. 283. That it may be punishment although civil in nature is, however, clearly established by those cases which have condemned legislative acts as bills of attainder.

In *United States v. Lovett,* 328 U.S. 303, 66 S. Ct. 1073, proscription from government employment by a statute which directed that none of the monies appropriated for the expense of the government should be used to pay the salaries of certain named government employees was held to be punishment. In *Cummings v. Missouri,* 4 Wall. 277, 18 L. Ed. 356, it was held that prohibiting one from following the occupation of a priest and teacher unless he first took an expurgatory oath was punishment. 18 L. Ed. at 362. In *Ex parte Garland,* 4 Wall. 333, 18 L. Ed. 366, decided the same day as the *Cummings* case, a rule of the Supreme Court of the United States prohibiting the practice of law by attorneys before it, unless they first took an expurgatory oath, was found to impose punishment. 18 L. Ed. at 370. In *Burgess v. Salmon,* 97 U.S. 381, 24 L. Ed. 1104, the collection of a tax on tobacco prior to the effective date of a statute which imposed the tax was civil punishment. 24 L. Ed. at 1106.

The punishment imposed even in the English bills of attainder was not always criminal. Thus this Court quoted in the *Cummings* case, 18 L. Ed. at 362, the

statute of 1 *George I*, Chapter 13, setting forth the class to whom the statute applied. Among other punishments, it provided a civil penalty of £500 to be recovered against any member of the class by anyone who sued for it. The statutes 9 and 10 *William III*, Chapter 32, also cited, imposed civil disabilities of incapacity for public office, and inability to sue in the civil courts.

Long before our Constitution was written, exile and transportation were penalties imposed for crime. See 1 *Stephen, History of the Criminal Law of England:*

> "* * * The punishment was unknown at common law, though in one case exile was at common law a consequence of crime. This happened when a criminal took sanctuary and confessed his crime. Upon this he was allowed to leave the kingdom, taking an oath of abjuration, as it was called, which bound him never to return; but sanctuary and abjuration were both abolished by 1 Jas. 1, c. 25, and 20 Jas. 1, c. 18. The earliest instances of transportation as a punishment seem to have occurred in the reign of Charles II, when pardons were granted to persons capitally convicted conditionally on their being transported for a number of years—usually seven. This practice was recognized, as I have observed, by the Habeas Corpus Act, and greatly extended by subsequent legislation, and particularly by the Act of 1768. It was first legalized as a substantive punishment by the Act of 4 Geo. 1, c. 11, already mentioned. In the course of the eighteenth and the early part of the present century an immense number of Acts were passed by which various terms of transportation, with alternative terms of imprisonment, and power, in some cases alter-

native and in other cumulative, to order whipping more or less frequently, were allotted to particular offences.". At page 480.

That transportation, like deportation, might be without temporal limit appears at page 481:

"In their Seventh Report the Criminal Law Commissioners refer to many instances of these capricious variations. They say, for instance, 'In seventeen different classes of cases the sentence may be transportation for life; in two the punishment is absolute without any alternative. In another, power is given to transport for any other term without fixing any minimum term of transportation or any alternative term of imprisonment. Of the fourteen other classes in one only is the minimum of transportation fifteen years.' 'In one case only is the minimum term of transportation ten years. We find fifteen varieties in punishments where the maximum is transportation for a term of fourteen or fifteen years. The instances in which the punishment of transportation for seven years may be inflicted present twenty-three varieties.' "

It is not argued here that transportation and deportation are precisely the same. They present, however, the same punishing aspect—exile from the nation in which the convicted one sought to remain.

When laws which prohibited one from following a chosen profession unless one took an expurgatory oath, or imposed fiscal penalties, are by the decisions of this Court punishment, it is shocking to deny that banishment from this country, after long residence here, is punishment. To deny that it is punishment,

at least in the popular sense, is to deny that the right or privilege of residing permanently in the United States is of more than trifling value. In the case of the appellant at bar, who came to the United States at the age of 2½ months and has never departed from it, to thrust him from the national community in which he has lived all but a few weeks of his life and to place him in a nation wholly as foreign to him as if he had never been there, cannot fail to qualify as punishment. He has sought United States citizenship. His deportation would mean that he cannot attain that status. To deny that depriving him of his opportunity to become a citizen of the United States is punishing him is to deny that American citizenship is a priceless possession.

It is possible, and in some of the past decisions of this Court it has been done, to present a circular argument in which one defines punishment in a technical and legalistic sense, so that it excludes the type of punishment before the Court. Thus one can say, "Punishment forbidden by the prohibition against bills of attainder is criminal punishment. This is not criminal punishment. Therefore this punishment is not forbidden." This type of argument, while it cannot fail, cannot convince.

It is true that in several cases this Court has rejected an attack on deportation statutes as bills of attainder by stating that deportation is technically not punishment. Thus Mr. Justice Holmes was able to say in *Bugajewitz v. Adams*, 228 U.S. 585, 33 S. Ct. 607, that deportation was not a punishment but

"simply a refusal by the government to harbor persons whom it does not want." He was there dealing with the question of the power to deport a prostitute. In other cases, aliens similarly undesirable because of illegal activity have been held deportable partly on the theory that deportation was not punishment.

It is impossible, however, to separate the act which is punished from the punishment, when examining the statute for its possible repugnance to the Constitution. It has never been held that it is not punishment to deport one for joining an organization, an act which Mr. Justice Frankfurter finds to be one of our national characteristics. (*Wieman v. Updegraff*, ... U.S. ....., decided December 15, 1952.) Likewise, it is unthinkable that it could be held that it would not be punishment if one were deported for entering into marriage, studying law, or attending mass. Such supposed decisions would only convince the people of the United States that law paid no attention whatever to reality.

If law, particularly constitutional law, is not to be couched in a refined and technical jargon incomprehensible to the governed of this nation, and intelligible only to those familiar with concepts far removed from the broad language of our fundamental law, deportation for an innocent act must be recognized as punishment.

Heikkila has grown from infancy to ripe manhood in the United States. His only ties with the Old World are ancestral. Since memory begins about age

4, he is psychologically as American as any Son
the American Revolution. Can the law courts s
to him and to the rest of the Americans that to ex
him from all he has ever known of organized soci
is not an act of punishment?

If it is the duty of this Court to keep the decisio
of the lower courts and the Acts of Congress cons
nant with the Constitution, it is no less its duty
see that the law speaks as clearly and honestly as th
document. That duty demands recognition that exi
is indeed punishment of the severest sort.

B. THE STATUTE IS AN EX POST FACTO LAW.

1. It disguises a penal sanction as a civil one.

Since *Calder v. Bull*, 3 Dallas 386, 1 L. Ed. 6
(1798), the classic definition of an *ex post facto* la
has been as follows:

(a) Every law that makes an action done befo
the passing of the law and which was inn
cent when done, criminal; and punishes su
action;

(b) Every law that aggravates a crime or mak
it greater than when committed;

(c) Every law that changes the punishment a
inflicts a greater punishment than was a
nexed when the crime was committed;

(d) Every law that alters the legal rules of ev
dence, and receives less, or different, tes
mony, than the law required at the time
the commission of the offense, in order
convict the offender.

Because it was not a penal statute, this Court in *Carlson v. Landon*, 342 U.S. 524, 72 S. Ct. 525, rejected the argument that the section of the Subversive Activities Control Act which specified deportation for one who had been a member of an organization that advocated overthrow of the government by force and violence was an *ex post facto* law. Doubtless many cases have held that unless the statute was penal it could not fall under the prohibition against *ex post facto* laws condemned in the Constitution, Article I, Sec. 9, Clause 3.

The Court has, however, never been at a loss to find an *ex post facto* law in a statute which was not in terms a criminal statute when it found the statute fulfilled the underlying requirement of unfairness, retrospective operation, and the imposition of punishment combined.

In the *Carlson* case the Court found that there was no retrospective operation of the statute because it had not modified the law which had been in effect for many years proscribing membership in organizations which advocated the overthrow of the government. Thus the Court found there was lacking that element of retroactive unfairness which is necessary to bring the case within the prohibition.

In *Fletcher v. Peck*, 6 Cranch, 86, 3 L. Ed. 162, the Court found that a statute was an *ex post facto* law which forfeited the estate of Fletcher by invalidating a contract. In *Burgess v. Salmon*, 97 U.S. 381, 24 L. Ed. 1104, the imposition of a tax under a statute which also allowed criminal prosecution for its eva-

sion was held to be an *ex post facto* law. In *Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356, *Pierce v. Carskadon*, 16 Wall. 234, 21 L.Ed. 276, and in *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366, similar decisions were reached by this Court.

This Court in *Harisiades v. Shaughnessy*, 342 U.S. 524, 72 S. Ct. 512, noted that in *Burgess v. Salmon*, supra, the Court had explained the cases cited above as proceeding upon the view that "Novel disabilities there imposed upon citizens were really criminal penalties for which civil form was a disguise." 72 S. Ct. at 522. There was nothing novel, however, about the punishments that were inflicted by the statutes condemned in those cases, if by novel is meant something unknown to the law. Expurgatory oaths were known in England before the American Revolution and commented upon by this Court in the *Cummings* case. Statutes which invalidated contracts were certainly nothing new at the time *Fletcher v. Peck*, supra, was decided. Proscription from government employment was not unknown at the time of the decision in *United States v. Lovett*, 328 U.S. 303, 66 S. Ct. 1073.

What then was novel? It was the imposition of punishment for acts which had not prior thereto been punishable, and which were lawful acts which no one could have known were performed at his peril. So in the case at bar, Heikkila joined the Communist Party. It was and is his view that the Communist Party was a political organization which did not advocate the overthrow of the Government of the United States by force and violence. At the time he joined it in 1929, at the time that he left it in 1939,

and in fact up until 1950, no statute stated that membership in that organization was illegal or a ground for deportation. In fact, as late as 1942, the Supreme Court of California (*Communist Party v. Peek*, 20 Cal. (2d) 536) decided that the provision of the Election Code of California, Section 2540.4, denying participation in primary elections to any party affiliated with the Communist Party of the United States or the Third Communist International, was unconstitutional; that the Court could not take judicial notice that the Communist Party advocated overthrow of the government by force; that the Communist Party had a constitutional right to place its candidates upon the ballot in California.

Only by the possession of a supernatural power to foresee the future could Heikkila have known that the act of joining a recognized, legitimate, active political organization which regularly advanced candidates for public office, would one day be regarded as grounds for his deportation. Nor was Heikkila alone in this blindness to the future. It is doubtless no bold statement to say that in 1939 and for the decade preceding it, few students of law would have predicted that participation in legitimate political activity would subject one to punishment more than a decade later. Participation in political activity was then regarded as the mark of a good and active citizen or resident.

It is, therefore, at least as novel to punish a man for joining a political organization as it was to ban one from federal employment on the basis of one's activities as an employee of the federal government,

as in *Lovett,* supra, or to bar one from teaching or practicing law because one had engaged in insurrection against the Republic, as in *Cummings* and *Garland,* supra. Those punishments were penal in disguise. So is this.

At any rate, to say and to mean that one's constitutional rights are determined by whether a statute which seeks to deprive one of them is a criminal or a civil statute, is to hide behind empty words. The distinction between civil and criminal legislation is clear only in enactments that deal with the obviously criminal or the obviously civil. Many statutes and rules of law are at the blurred edges where a valid argument can be made either way. Such lump concept thinking should not determine whether the freedoms guaranteed by our Constitution are available or not.

A brief and lucid description of the futility of attempting to draw a sharp line between the civil and criminal law appears in M. R. Cohen's article in 84 *University of Pennsylvania Law Review* at page 686. The article is entitled *"On Absolutisms in Legal Thought."* He says in part:

> "As regards substance and as regards procedure the civil and the criminal law overlap so that it is impossible to say with absolute precision where one begins and the other ends. As to substance, few today will venture to assert that all criminal acts involve greater moral turpitude than the frauds and other acts which constitute torts. Nor can we maintain the old view that the criminal law deals with acts which en-

danger the common welfare while the civil law deals with what is of interest only to private individuals. The general social interest in the maintenance of proper family relations, of proper industrial relations and the like, is certainly as great as that involved in the protection offered by large parts of the criminal law against various misdemeanors. Indeed, are not the same interests often protected in both ways, and are there not many acts which are both civil and criminal wrongs? As to the difference of procedure, it is easy enough to call certain procedures criminal and others civil, but not easy to define the difference. The layman who generally thinks of crimes as serious felonies like murder and robbery, naturally says that criminal prosecutions are brought by officers of the state who are in duty bound to do so, whereas a private action is brought by an individual at his option. But leaving aside the classic common-law forms of private prosecution for criminal offenses and the fact that in England the Attorney-General can still prosecute certain cases of tort, we still face the fact that an action for the collection of land tax, or other obligation to the government, may take the form of a civil suit. Despite all sorts of theoretical differences, such as the different degrees of evidence required, such civil actions do not in effect differ very much from prosecutions to enforce penalties for certain misdemeanors. Nor can the sentence which results from criminal procedure be always sharply distinguished from the judgment in a civil action. To be sure, no civil action any longer terminates in death or imprisonment, as the old Roman and Teutonic law often did. Yet even today, imprisonment for certain kinds of debts, for non-pay-

ment of alimony, and for contempt of court often grows out of civil procedure. Nor are the fines of the criminal law necessarily more severe than the civil damages that are frankly recognized as punitive. Consider, for instance, the triple damages paid by the Danbury union hatters under the Sherman Anti-Trust Law. In some cases this meant the loss of home and all of a life's savings. Can we doubt that this was a punishment more severe than that for many misdemeanors? Men sometimes prefer to go to jail rather than pay certain fines, and the appointment of receivers to take charge of one's business is sometimes regarded as even worse."

In the field of deportation law a striking example of the concurrence of civil and criminal penalties is provided by Section 266 of the Immigration and Nationality Act. Public Law 414, 82d Congress, 2d Session.

It is provided in subsection (b) of Section 266 that an alien who fails to give written notice to the Attorney General as required by Section 265 of the title shall be guilty of a misdemeanor, and upon conviction be fined not to exceed $200 or imprisoned not more than thirty days, or both. It is then provided that irrespective of whether an alien is convicted and punished as so provided, any alien who fails to give written notice to the Attorney General as provided by Section 265 is to be taken into custody and deported, unless such alien establishes to the satisfaction of the Attorney General that his failure was reasonably excusable or was not wilful. Thus the penalty of deportation may be imposed either for

conviction of a crime, or for the same act without conviction. In both civil and criminal procedures under this section the question of wilfulness would be pertinent. Deportation might, therefore, be an immediate consequence of conviction. Deportation might also be the consequence of the same act without the conviction.

The statute here attacked is a criminal statute in the sense in which that term has been used in cases holding the statutes invalid because they were *ex post facto* laws.

2. The statute modifies a rule of evidence.

At least since the rule was announced in *Calder v. Bull*, 3 Dallas 386, 1 L. Ed. 648 (1798), one of the earmarks of an *ex post facto* law has been that it modifies a rule of evidence so that less evidence is required for a conviction than was the case before the statute was enacted. It is true that the cases use the language of the criminal law when they speak of "conviction." The principle underlying the rule, however, is the same as that underlying the prohibition against *ex post facto* laws in general. Not that a penalty, labelled "criminal", is imposed after a conviction obtained by less evidence than was necessary at the time the act was committed, but that a pain, penalty, or punishment has been imposed which the actor had no reason to expect at the time he committed the act. If, as this Court found in *Burgess v. Salmon*, 97 U.S. 381, 24 L. Ed. 1104, statutes may be *ex post facto* laws where no admittedly criminal

penalty is imposed, then the prohibition may apply where a rule of evidence is modified so that a punishment may be imposed although the punishment is disguised as a civil penalty.

If there is any rationale whatever to the statute here under review, it is that the Communist Party of the United States is, and at all times has been, an organization which advocated the overthrow of the Government of the United States by force and violence. It was proof of this question which, until the passage of the Subversive Activities Control Act of 1950, occupied the efforts of prosecuting attorneys in criminal syndicalist and deportation cases where the alien was alleged to be a member of the Communist Party. See *Ex parte Fierstein*, 41 F. (2d) 53 (C.C.A. 9, 1930).

In *Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S. Ct. 512, the language of the Court about the advocacy of forcible change by admitted Communists was based upon a *finding* approved in each case by the court below and not questioned on appeal, that the Communist Party taught and advocated the overthrow of the Government of the United States during the membership of the appellants. 72 S. Ct. 516.

Advocacy of overthrow of the Government by force and violence is punishable activity. It is punishable because every government is said to have the power to protect itself against violent overthrow. Heretofore, before any person could be punished for so advocating, it had been necessary to establish the advocacy either by the individual or, at the very least, by the

organization. Under this statute that is no longer necessary.

As Mr. Justice Frankfurter remarked in his dissenting opinion in *Carlson v. Landon*, 342 U.S. 524, 72 S. Ct. 525 at 546, speaking of the very section of this same statute here under review:

> "The Immigration authorities were by the Act relieved of proving—in order to make a prima facie case—that the Communist Party is an 'organization * * * that believes in, advises, advocates, or teaches * * * the overthrow by force or violence of the Government.'"

As a matter of fact, under the plain meaning of the statute and as it has been interpreted by the Immigration Service and by the court below in the case at bar, it is not a prima facie case only, but a complete case that is made by establishing membership in the Communist Party. Proof of that fact alone must, if the Act has a rational basis as was said above, be deemed proof also that the alien belonged to an organization which advocates the overthrow of the Government by force and violence.

This is a modification of the rule of evidence which was in effect prior to the passage of this statute.

This is not a procedural change as to which retroactivity is no reproach. This takes from the accused alien a fundamental defense—the defense that he did not and the organization to which he belonged did not in fact advocate the overthrow of the Government by force and violence. Under the rationale of the statute guilt consists not in membership in an organization

alone, but in membership in an organiaztion which advocates the overthrow of government by force and violence. By depriving the accused of an opportunity to demonstrate that his organization did not so advocate, he is deprived of an opportunity to contest the fact of guilt. The statute, therefore, permits guilt to be adjudged without evidence of guilt. As such it is an *ex post facto* law and void.

3. It is retrospective in operation.

The most essential element of an *ex post facto* law is, of course, that it be enacted after the fact which it seeks to punish. In the *Harisiades* case this Court has said that the statute there considered, making it a deportable offense to have been a member of an organization that advocated the overthrow of the government by force and violence at any time since entry, was not a new and isolated enactment, but a continuation of prior legislation. The Court said that since 1920 Congress had maintained a standing admonition to all aliens not to become members of such an organization. "There can be no contention," said the Court, "that they were not adequately forewarned, both that their conduct was prohibited and of its consequences." 72 S. Ct. at 520-521. Membership in the Communist Party, however, was never before proscribed by any act of Congress.

As late as 1939, when appellant in this case left the Communist Party, this Court had affirmed a decision of the Court of Appeals for the Fifth Circuit, which had held that the evidence introduced in a de-

portation case was insufficient to support finding that the Communist Party or the alien during the period of the alien's membership in 1933, taught, advocated, or incited the overthrow of the government by force and violence. It held that membership in the Communist Party in 1933 was not in 1939 a statutory ground for deportation. *Kessler v. Strecker,* 307 U.S. 22, 59 S. Ct. 694.

Following the decision in that case, the Congress passed the Alien Registration Act of 1940, 54 Stats. 670, 8 U.S.C. 137, amending the Act of 1920 to provide that any alien who had been at any time after entry a member of any of the excluded classes should be taken into custody and deported. *It was not until 1950, however, with the passage of the statute here attacked, that the Congress provided that membership in the Communist Party of the United States should be ground for deportation.*

When the Alien Registration Act of 1940 was passed, the Congress had before it the decision of this Court in *Kessler v. Strecker,* supra, and the statement of this Court therein:

> "* * * The District Court dismissed the writ. The respondent appealed to the Circuit Court of Appeals assigning error to the District Court's action in denying each of his contentions. That court found that the hearings had been fair, but held that each of the findings recited in the warrant was without support in the evidence. The court was of opinion the evidence failed to show that the respondent is now a member of the Communist Party *or that he or that party, in 1933, taught, advocated, or incited the overthrow of the Gov-*

> *ernment by force and violence,* and that the record was bare of evidence to countervail his denial that he had ever taught or believed in the unlawful destruction or overthrow of the Government by force. The court held that the Acts of 1918 and 1920 were passed to meet a situation caused by crises in Russia in 1918 and 1919; that the major changes in policy and conduct of the Soviet Socialist Republics which had taken place between 1918 and 1933 rebutted the implications *arising from membership in the Communist Party at the time the Acts were adopted;* that mere membership in that party in 1933 is not a statutory ground for deportation. 59 S. Ct. at 696. (Emphasis supplied.)

Congress also knew that in the *Kessler* decision this Court had considered the action of the Court of Appeals for the Fifth Circuit which had reversed the District Court "with directions to try the issues de novo as suggested in *Ex parte Fierstein* (CCA) 9 Cir., 41 F.2d 53 at p. 54."

Ex parte Fierstein, as Congress must have known, was a case in which the Court of Appeals for the Ninth Circuit refused to take judicial notice that the Communist Party was an organization that advocated the overthrow of the Government and reversed a District Court decision which had denied a writ of habeas corpus in a deportation case because the evidence introduced in the administrative hearing was insufficient to establish that the Communist Party so advocated. The Congress knew too that this Court held it error to hold a trial *de novo,* in which the finding of

the Secretary of Labor might be corrected or strengthened. *Kessler v. Strecker*, at p. 34.

Nothing could be clearer than that, had Congress intended in passing the Alien Registration Act of 1940 to make it the law of the United States that membership in the Communist Party of the United States at any time since entry was a ground for deportation, it had every opportunity to do so by express terms, and its failure to use such language made it abundantly evident that it had not intended to so provide.

The provision here under attack, therefore, which attempts to do what the Congress did not attempt in 1940, is clearly retrospective legislation. It is retrospective legislation which imposes punishment for an act which was not punishable at the time it was committed, for an act long past and done with, for an act which at the time it was committed could not have been regarded as prohibited by civil or criminal law, but was clearly an exercise of that right of association not yet denied the people in the United States. It must be condemned as an invalid *ex post facto* law.

C. THE STATUTE VIOLATES THE FIRST AND FIFTH AMENDMENTS.

This Court has in many decisions, beginning with *Fong Yue Ting v. United States*, 149 U.S. 698, 13 S. Ct. 1016, and most recently in the *Carlson* and *Harisiades* cases, held that the power of Congress to de-

port undesirable aliens is a plenary power. It is said that the Congress can deport any class of aliens it deems undesirable. Reliance upon this plenary power has become the standing answer of the Government to all attacks upon its deportation activities. That power is not denied by the appellant here, nor attacked in this case. It is not denied and it is not attacked because it is not relevant to the issue before the Court.

The issue here is not whether Congress has the power to deport any alien it deems undesirable, but whether it has the power to enact bills of attainder and *ex post facto* laws, or any laws that contravene positive constitutional prohibitions.

The power to deport any alien deemed hurtful to the country is not the power to deport any alien by any mode which the Congress may deem desirable. It will surely be agreed that Congress could not deport aliens by having them bodily pushed into the Atlantic or Pacific Oceans and told to swim for the farther shore. Nor could it order them deported as punishment for conviction of a crime, if the conviction were obtained by summary procedure devoid of the elements of due process of law. *Wong Wing v. United States,* 163 U.S. 228, 16 S. Ct. 977; *Wong Yang Sung v. McGrath,* 339 U.S. 33, 70 S. Ct. 445. It cannot do such things because ours is a government of powers granted by the people—that is to say, its power is limited to that granted. When the Constitution says, "No Bill of Attainder or ex post facto Law shall

be passed," it means that although Congress may not be limited in the ends it may attain, it is limited as to the means it may use to any end.

Unless the words "No Bill of Attainder or ex post facto Law shall be passed" mean that Congress has no power to pass such bills, what can they mean? Can they mean that Congress has no power to pass such bills where they affect citizens, but may pass such bills where they affect aliens only?

If so, then the provisions of this constitutional prohibition differ from all others in their effect upon the power of the Congress. Neither Congress nor the states may take an alien's property without due process of law, nor deprive him of the equal protection of the laws (*Yick Wo v. Hopkins,* 118 U.S. 356, 6 S. Ct. 1064; *Truax v. Raich,* 239 U.S. 33, 36 S. Ct. 7); he may not be denied the writ of habeas corpus (*Nishimura Ekiu v. United States,* 142 U.S. 651, 12 S. Ct. 336); he may not be denied a trial by jury, because the Sixth Amendment says that "In *all* criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury * * *"; nor may he be denied presentment or indictment by a grand jury, because the Fifth Amendment says, "*No person* shall be held to answer for a capital, or otherwise infamous crime, unless upon a presentment or indictment of a Grand Jury." (*Wong Wing v. United States,* supra.) He may not be denied bail in a criminal case (*Stack v. Boyle,* 324 U.S. 1, 72 S. Ct. 1).

Even in a deportation case, he may not be denied that fairness which is inherent in our guarantee of due process of law as contained in the Fifth Amendment (*Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S. Ct. 445).

It is frequently said in the cases that the power to deport is closely allied to the conduct of international affairs and is therefore entrusted to the political branches of the Government. *Carlson v. Landon*, 342 U.S. 524, 72 S. Ct. 525. For this reason it is only with great hesitation that the courts sit in judgment upon congressional enactments dealing with deportation. Does the political aspect of the power to deport mean that constitutional prohibitions such as those discussed above may be disregarded by the Congress in passing deportation legislation? The argument that deportation statutes aimed at members of the Communist Party are political in nature and free from judicial scrutiny is based upon several related theories. It is said in *Carlson v. Landon*, supra, that alien communists are deportable like anarchists "because of Congress's understanding of their attitude toward the use of force and violence in such a constitutional democracy as ours to accomplish their political aims * * *" 72 S. Ct. at 535.

In the *Harisiades* case, supra, it was said that "Any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of gov-

ernment." 72 S. Ct. 519. It is further stated that such political decisions are not reviewable, as to their wisdom, by this Court.

Underlying both of these theories is the policy that Congress has complete power to protect the security of the United States. It is that power which enables it to strike at those who would use force and violence to achieve governmental change. The same power underlies our conduct of foreign relations, the war power, and the maintenance of a republican form of Government.

Such a power must extend as far as is necessary to achieve its purpose—the protection of our national security. In what way then can it be said to be limited to the control of alien Communists? It is not their alien character that is said to make such Communists dangerous, but their advocacy of the use of force to achieve change in the Government. If this much be granted, it must follow that the unreviewable political power of Congress to protect the security of the United States, if there is such a power, must extend to the control of citizens as well as alien Communists.

The theory that Congress has such an unlimited power, when placed beside constitutional limitations upon the power of Congress, raises the question whether in the view of the founding fathers the Constitution was designed to delineate governmental powers and their limitations for times of prosperity only, or for times of adversity also. If it is argued

that constitutional prohibitions which apply in normal times do not apply in times like these, then the view must be taken that the Constitution did not envisage times like these.

By the terms of the Constitution no bills of attainder or *ex post facto* laws may be passed, whether the times be good or ill. By the terms of the Constitution, all legislative enactments are subject to judicial review. The completeness of the constitutional prohibition is logically inconsistent with the view that the prohibitions and guarantees of the Bill of Rights and other sections of the Constitution were not designed to apply in cases where the protection of the national security was involved. More than 150 years of national existence without disregard of the limitations placed on Congressional power demonstrate that even in times of war and insurrection our governmental scheme has been sound.

If during the Civil War, when for four years the country was split in two and the two sections were at each other's throat with guns and knives, it was not necessary to find an unreviewable political power in Congress, how can the Court justify finding such a power today in times of peace? Yet it is now suggested that the Constitution allows Congress to avoid its fundamental limitations upon congressional power because it is dealing with the security of the Government.

No decisions of our courts have extended the idea that Congress has a nonreviewable political power as far as this. When the Legislature of Oklahoma sought to protect its internal security by requiring

a loyalty oath of its employees and officers, this Court held that it could not do so by an oath which offended due process. *Wieman v. Updegraff,* supra. The oath offended due process because it imposed a penalty (deprivation of government employment) upon state employees (whether alien or citizen) by the fact of membership in an organization alone, without requiring or permitting the affected individuals to establish their lack of knowledge of any subversive intent or purpose in any organization to which they may have belonged. In the concurring opinion of Mr. Justice Black such legislation is characterized not only as a bill of attainder imposing pains and penalties for past lawful associations and utterances, but as a violation of the First Amendment's guarantee of freedom of speech. With this Mr. Justice Frankfurter in his concurring opinion agrees. Not only does he agree, but he points to the fact that legislation which operates in this manner strikes at the very root of our democratic system by choking the source of public opinion.

The statute attacked in the case at bar operates in essentially the same way as does the Oklahoma statute condemned in the *Wieman* case. Membership alone imposes penalties although the membership at the time it occurred was lawful and although it may have ceased before any penalty is sought to be imposed. Under the rule of the *Wieman* case, therefore, the sections of the Subversive Activities Control Act here questioned violate the Fifth Amendment's guarantee of due process and the First Amendment's guarantee of freedom of speech.

D. THE DEPORTATION ORDER VIOLATES THE PRIVILEGE AGAINST SELF-INCRIMINATION OF THE FIFTH AMENDMENT.

The deportation order in this case is based solely upon the testimony of appellant given in a 1949 hearing, that he was a member of the Workers Party and later the Communist Party, its successor, from 1929 to 1939. All other evidence in the administrative record was either stricken or treated as stricken. (R. 12, 13.) The stricken evidence included testimony about the nature and aims of the Communist Party. (R. 12.) The manner in which that testimony became available for reliance upon by the Immigration Service is somewhat unusual.

Initial deportation hearings in the case were held in June 1949. (R. 9.) At that time appellant was charged with present membership in an organization which advocated overthrow of the Government by force and violence. During the course of the hearing he testified to his former membership in the Workers Party and the Communist Party and offered to prove that neither he nor the organization during his membership in it had advocated overthrow of the Government by force and violence.

Subsequent to the decision of this Court in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S. Ct. 445, those hearings were abandoned because they had not been conducted in conformity with the Administrative Procedure Act, 5 U.S.C. 1001, et seq. (R. 3.)

Thereafter in 1950 new hearings were convened. Appellant testified that he was not a member of the

Communist Party. He was then asked whether he had ever been a member of the Communist Party of the United States. This was objected to and petitioner refused to answer the question on advice of counsel. (R. 11.) Thereupon over objection that it was immaterial, the transcript of appellant's testimony from the 1949 hearing was admitted. The theory of the Hearing Examiner was that it was admissible as an admission against interest although the only charge pending was that of then present membership in the Communist Party. (R. 12.)

After this evidence had been admitted, a new charge was lodged that appellant had been since entry a member of the Communist Party of the United States. Consideration was limited to the lodged charge by the Hearing Officer. (R. 12.)

It is claimed by the appellant that the introduction of this evidence violated the guarantee against self-incrimination. Admittedly this claim is not based upon exact precedent. It is, however, based upon the following theory.

At the time the testimony was given in 1949 there was no reason to claim the privilege. There was then no provision allowing deportation for membership in the Communist Party, nor any statutory or common law crime which was evidenced by membership in the Communist Party.

When appellant testified about his Communist Party membership on June 13, 1949, it was not then clear that the Department of Justice held a theory

that membership in the Communist Party was evidence of subversive activity in violation of the Smith Act. At the earliest, this became known to the general public on August 30, 1949, when the Attorney General published a statement in *Look* magazine. See *Alexander v. United States*, 181 F. (2d) 480, 487 (9 Cir.). At the earliest, it was not until the decision of *Wertheimer v. United States*, 179 F. (2d) 559, 563 (10 Cir.), *Jan. 5*, 1950, that it was clear that a claim of the privilege against self-incrimination was good where the question concerned membership in the Communist Party.

Of course, the decision in *Wertheimer* was based upon prior decisions, but it is not for the Department of Justice now to maintain that that decision should have been foretold by appellant. The Department of Justice had another theory at the same time that it was prosecuting members of the Communist Party as violators of the Smith Act. The second theory was that used by Department of Justice special prosecutors in actions against Communists. It was that under *Schneiderman v. United States*, 320 U.S. 118, 63 S.Ct. 1333, the claim of privilege was not available when the question concerned membership in the Communist Party. See *Alexander v. United States*, supra, at 181 F. (2d) 480, Feb. 4, 1950.

When appellant refused to testify regarding his membership in the Communist Party, during the 1950 hearing, he objected to the introduction of the transcript of his former testimony. The evidence as offered at that time was immaterial because the charge

under which he was being tried was not membership in the Communist Party, but membership in an organization which advocated overthrow of the Government. Furthermore, the testimony was already matter of record and the claim of the privilege at that time, had it been allowed, would not have prevented an attempt to use that recorded testimony in a Smith Act prosecution. It could have been used either to found an inference that his prior membership had continued or as a lead to evidence of membership after 1939.

It was, therefore, not incumbent upon him to raise the claim of the privilege at the time the evidence was offered on June 13, 1950. (R. 10, 11, 12.) Nevertheless, he had not waived his privilege.

> "Since the privilege against self-incrimination presupposes a real danger of legal detriment arising from the disclosure, petitioner cannot invoke the privilege where the response to the specific question in issue here would not further incriminate her." *Rogers v. United States,* 340 U.S. 367, 372, 71 S. Ct. 438, 442.

Cf. *Arndstein v. McCarthy,* 254 U.S. 71, 41 S. Ct. 26, and *McCarthy v. Arndstein,* 262 U.S. 355, 43 S. Ct. 562.

In 1949 his testimony about membership served the function of qualifying him as a witness on the aims and purposes of the party. It was, therefore, given under compulsion, at least in the sense that had he not testified he might have been deported for

membership in an organization which advocated overthrow of the Government by force and violence. It was material to the issue before the tribunal at the time and it did not subject him to any penalties. Where there is no intention of waiving the privilege, there is no waiver. *Amos v. United States*, 255 U.S. 313, 41 S. Ct. 266.

One is ordinarily privileged to prevent one's own incrimination by testimony from one's own lips. Yet it was just such testimony which was introduced in the record over appellant's valid objection, which forms the sole support for the deportation order in the case at bar.

One is ordinarily reluctant to argue that evidence free of any internal flaws which establishes a point in issue may not be used, no matter under what circumstances it was obtained. If judicial or quasi-judicial tribunals are charged with determining matters of fact, then, it is argued, any evidence probative of the facts should be received. That policy, however, is overridden in our law by the greater value placed upon procedural regularity. (*Amos v. United States*, supra.) Illegally obtained evidence is not admissible in federal tribunals. Here the evidence was not obtained by an illegal search or seizure. It was obtained, however, by placing appellant in a position in 1949 hearings where his failure to testify might have subjected him to deportation, and where the claim of the privilege against self-incrimination was either not tenable or not called for. He was placed in this posi-

tion by the use of a procedure invalid under federal statute and under the Constitution. *Wong Yang Sung v. McGrath,* supra. By a subsequent change in the law the effect of his testimony was so modified that he should then, consistently with the theory of the privilege against self-incrimination, have been able to deny to the tribunal before which he appeared, his own testimony on the issue of membership in the Communist Party. He attempted to deny it to the tribunal, but the testimony was used nevertheless. There is no real distinction between this use of his prior recorded testimony and the use of testimony forced from him at the 1950 hearing by threats or torture.

The testimony thus obtained is the sole support of the deportation order. Regardless of the decision of this Court on all other issues in the case, the deportation order must be invalidated for its repugnance to the guarantees against self-incrimination contained in the Fifth Amendment.

E. THE JUDGMENT OF THE COURT BELOW DEPRIVED APPELLANT OF DUE PROCESS OF LAW.

The Court below dismissed the complaint without opinion. By its dismissal it ruled that appellant was not entitled under the circumstances of this case to a declaratory judgment on the constitutionality of the statute attacked, on the claim of illegal self-incrimination, or on the claim that the hearing officer was

not impartial as required by the Administrative Procedure Act. This was reversible error. *McGrath v. Kristensen,* 340 U.S. 162, 71 S.Ct. 224.

By its decision the District Court denied appellant a review of administrative action under the provisions of Section 10 of the Administrative Procedure Act, 5 U.S.C.A. 1009. While the question of the availability of such review has not been authoritatively determined by this Court (see *McGrath v. Kristensen,* supra), it has been passed upon by the Second Circuit in *United States ex rel. Trindler v. Carusi,* 166 F. (2d) 457 (3 Cir.). By the plain meaning of the Administrative Procedure Act such review must be deemed available.

By its decision granting the Government's motion to dismiss, the District Court held that as a matter of law one may be deported although he never advocated the overthrow of the Government by force and violence, nor belonged to any organization that so advocated; although he was ordered deported by a hearing officer who was not impartial; although the order for his deportation was supported solely by his own testimony in violation of the privilege against self-incrimination. These were the allegations of his complaint. They must be taken as true for the purposes of deciding a motion to dismiss. To deny plaintiff a trial on the merits and to deny him even the power to require the Government to meet his allegations by an answer, is a denial of justice and of due process of law. *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 71 S. Ct. 624 (1951).

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed.

Dated, San Francisco, California,
January 12, 1953.

ALLAN BROTSKY,
Counsel for Appellant.

GLADSTEIN, ANDERSEN & LEONARD,
LLOYD E. MCMURRAY,
Of Counsel.

(Appendices "A" and "B" Follow.)

Appendices "A" and "B"

Appendix "A"

In the United States District Court for the Northern District of California, Southern Division

No. 31,671

William Heikkila,
Plaintiff,

vs.

Bruce G. Barber, Individually and as District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District; John Doe One, through John Doe Ten, inclusive,
Defendants.

JUDGMENT

William Heikkila, plaintiff herein, having applied to a judge of this Court for an interlocutory injunction restraining the enforcement, operation and execution of an Act of Congress for repugnance to the Constitution of the United States, and Bruce G. Barber, defendant herein, having moved to dismiss this action, and said application and motion having been heard by this court of three judges under section 2284 of Title 28 of the United States Code, and this court

aving concluded that said motion should be granted, is hereby ordered, adjudged and decreed that said motion be, and it is, hereby granted, that this action e, and it is, hereby dismissed, and that said defendnt Barber recover his costs.

Dated August 4, 1952.

/s/ CLIFTON MATHEWS,
United States Circuit Judge;

/s/ LOUIS E. GOODMAN,
United States District Judge;

/s/ OLIVER J. CARTER,
United States District Judge.

Appendix "B"

EXCERPTS FROM SEC. 22 OF THE SUBVERSIVE ACTIVITIES CONTROL ACT OF 1950, AS CODIFIED: TITLE 50, USC.

Sec. 783. Offenses—

(a) Conspiracy or attempt to establish totalitarian dictatorship. It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 782 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

* * * * * *

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

Sec. 786. Registration and annual reports of Communist organizations—

(a) Communist-action organizations. Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

(b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-front organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-front organization.

Sec. 791. Subversive Activities Control Board—

(a) Creation; membership; designation of Chairman; removal. There is established a board, to be known as the Subversive Activities Control Board, which shall be composed of five members, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three members of the Board shall be members of the same political party. Two of the original members shall be appointed for a term of one year, two for a term of two years, and one for a term of three years, but their successors shall be appointed for terms of three

years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

* * * * * * *

(e) It shall be the duty of the Board—

(1) upon application made by the Attorney General under section 792(a) of this title, or by any organization under section 792(b) of this title, to determine whether any organization is a "Communist-action organization" within the meaning of paragraph (3) of section 782 of this title, or a "Communist-front organization" within the meaning of paragraph (4) of section 782 of this title; and

(2) upon application made by the Attorney General under section 792(a) of this title, or by any individual under section 792(b) of this title, to determine whether any individual is a member of any Communist-action organization registered, or by final order of the Board required to be registered, under section 786(a) of this title.

* * * * * * *

Sec. 792. Proceedings before Board—

(a) Petition by Attorney General for registration; verification; contents. Whenever the Attorney General shall have reason to believe that any organi-

zation which has not registered under subsection (a) or subsection (b) of section 786 of this title is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 787 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

* * * * * * *

(c) Upon the filing of any petition pursuant to subsection (a) or subsection (b) of this section, the Board (or any member thereof or any examiner designated thereby) may hold hearings, administer oaths and affirmations, may examine witnesses and receive evidence at any place in the United States, and may require by subpena the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed relevant, to the matter under inquiry. Subpenas may be signed and issued by any member of the Board or any duly authorized examiner. Subpenas shall be issued on behalf of the organization or the individual who is a party to the proceeding upon request and upon a statement or showing of general relevance and reasonable scope of the evidence sought. Such attendance of witnesses and production of such docu-

mentary evidence may be required from any place in the United States at any designated place of hearing. Witnesses summoned shall be paid the same fees and mileage paid witnesses in the district courts of the United States. In case of disobedience to a subpena, the Board may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpena issued to any person, issue an order requiring such person to appear (and to produce documentary evidence if so ordered) and give evidence relating to the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. No person shall be held liable in any action in any court, State or Federal, for any damages resulting from (1) his production of any documentary evidence in any proceeding before the Board if he is required, by a subpena issued under this subsection, to produce the evidence; or (2) any statement under oath he makes in answer to a question he is asked while testifying before the Board in response to a subpena issued under this subsection, if the statement is pertinent to the question.

(d) (1) All hearings conducted under this section shall be public. Each party to such proceeding shall

have the right to present its case with the assistance of counsel, to offer oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. An accurate stenographic record shall be taken of the testimony of each witness, and a transcript of such testimony shall be filed in the office of the Board.

(2) Where an organization or individual declines or fails to appear at a hearing accorded to such organization or individual by the Board pursuant to this section, the Board may, without further proceedings and without the introduction of any evidence, enter an order requiring such organization or individual to register or denying the application of such organization or individual, as the case may be. Where in the course of any hearing before the Board or any examiner thereof a party or counsel is guilty of misbehavior which obstructs the hearing, such party or counsel may be excluded from further participation in the hearing.

"(e) In determining whether any organization is a "Communist-action organization", the Board shall take into consideration—

(1) the extent to which its policies are formulated and carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world

Communist movement referred to in section 781 of this title; and

(2) the extent to which its views and policies do not deviate from those of such foreign government or foreign organization; and

(3) the extent to which it receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization; and

(4) the extent to which it sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement; and

(5) the extent to which it reports to such foreign government or foreign organization or to its representatives; and

(6) the extent to which its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of such foreign government or foreign organization or its representatives; and

(7) the extent to which, for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives, (i) it fails to disclose, or resists efforts to obtain information as to, its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein;

(iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meetings are secret; and (v) it otherwise operates on a secret basis; and

(8) the extent to which its principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization.

(f) In determining whether any organization is a "Communist-front organization", the Board shall take into consideration—

(1) the extent to which persons who are active in its management, direction, or supervision, whether or not holding office therein, are active in the management, direction, or supervision of, or as representatives of, any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 781 of this title; and

(2) the extent to which its support, financial or otherwise, is derived from any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 781 of this title; and

(3) the extent to which its funds, resources, or personnel are used to further or promote the objectives of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 781 of this title; and

(4) the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 781 of this title.

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order requiring such organization to register as such under section 786 of this title; or

(2) that an individual is a member of a Communist-action organization (including an organization required by final order of the Board to register under section 786(a) of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order requiring him to register as such under section 787 of this title.

(h) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney Gen-

eral an order denying his petition for an order requiring such organization to register as such under section 786 of this title; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order denying his petition for an order requiring such individual to register as such member under section 787 of this title; and send a copy of such order to such individual.

(i) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to cancel the registration of such organization and relieve it from the requirement of further annual reports; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is not an officer of a Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon

the Attorney General an order requiring him to (A) strike the name of such individual from the registration statement or annual report upon which it appears or (B) cancel the registration of such individual under section 787 of this title, as may be appropriate; and send a copy of such order to such individual.

(j) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order denying its petition for the cancellation of its registration and for relief from the requirement of further annual reports; or

(2) that an individual is a member of a Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is an officer of a Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order denying his petition for an order requiring the Attorney General (A) to strike his name from any registration statement or annual report on which it appears or (B) to cancel the registration of such individual under section 787 as the case may be. . .

(k) When any order of the Board requiring registration of a Communist organization becomes final under the provisions of section 793(b) of this title, the Board shall publish in the Federal Register the fact that such order has become final, and publication thereof shall constitute notice to all members of such organization that such order has become final.

Sec. 793. Judicial review—

(a) Courts of Appeals; petition; place; record; transfer; conclusiveness of Board's findings; additional evidence; modification by Board; judgment; finality. The party aggrieved by any order entered by the Board under subsection (g), (h), (i) or (j) of section 792 of this title may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the Board shall certify and file in the court a transcript of the entire record in the proceeding, including all evidence taken and the report and order of the Board. Thereupon the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board; but the court may in its discretion and upon its own motion transfer any action so comenced to the United States Court of Appeals for the circuit wherein the petitioner resides. The findings of the Board as to the facts, if supported

by the preponderance of the evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by the preponderance of the evidence, shall be conclusive, and its recommendations, if any, with respect to action in the matter under consideration. If the court shall set aside an order issued under subsection (j) of section 792 of this title it may, in the case of an organization, enter a judgment canceling the registration of such organization and relieving it from the requirement of further annual reports, or in the case of an individual, enter a judgment requiring the Attorney General (A) to strike the name of such individual from the registration statement or annual report on which it appears, or (B) cancel the registration of such individual under section 787 of this title, as may be appropriate. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.